(3)

No. 97-2048

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM D. O'SULLIVAN,
Petitioner,

v.

DARREN BOERCKEL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RESPONDENT

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QUESTION PRESENTED

MAY AN INDIVIDUAL WHO IS IN CUSTODY PURSUANT TO A STATE CRIMINAL CONVICTION PURSUE CLAIMS IN A FEDERAL HABEAS PETITION IF THOSE CLAIMS WERE NOT RAISED ON DIRECT APPEAL IN A PETITION FOR DISCRETIONARY REVIEW TO THE STATE'S HIGHEST COURT?

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SUMMARY OF ARGUMENT

The Illinois Attorney General's brief incorrectly casts this case in terms of exhaustion, when it is really arguing for procedural default. The Attorney General acknowledges that Boerckel has no way of seeking state review of the claims at issue in this case. Boerckel has not procedurally defaulted his claims because procedural default occurs only when a prisoner fails to comply with a firmly established state rule. In this case, the Attorney General's complaint is based not on a claim that Boerckel failed to follow a state rule, but on the fact that Boerckel did not disregard Ill.S.Ct.R. 315(a).

Illinois recognizes that the practice of the Illinois Supreme Court regarding discretionary review is similar to this Court's *certiorari* practice. Consistent with this Court's *certiorari* practice, a prisoner should not be penalized for screening the claims he seeks to present to the Illinois Supreme Court in accordance with that court's rule. Adopting the position urged by the Attorney General and requiring prisoners to disregard the Illinois Supreme Court's rule or forfeit their right to federal habeas review would burden the state supreme courts for little or no benefit to the federal courts. Moreover, it would be inequitable to punish prisoners for following the rules adopted by the state.

Illinois does not require that claims be presented in a petition for leave to appeal on pain of forfeiture, and it had no such requirement at the time Boerckel filed his petition for leave to appeal. In fact, Ill.S.Ct.R. 315(a) discourages prisoners from presenting all possible claims in a petition for leave to appeal, channeling routine claims of error to the intermediate appellate courts and reserving the resources of the state supreme court for questions of broader significance. Boerckel complied with Ill.S.Ct.R. 315(a) when he prepared his petition for leave to appeal. He has not violated any firmly established state rule.

The position urged by the Illinois Attorney General is inconsistent with recognized principles of comity and federalism. The Illinois Constitution and the Illinois legislature have granted the Illinois Supreme Court the power to establish rules of practice and procedure for the courts. The Illinois Supreme Court adopted Ill.S.Ct.R. 315(a) which discourages litigants from presenting every possible claim in a petition for leave to appeal. An Illinois appellate court has held that the doctrine of waiver is inappropriate to petitions for leave to appeal. The Illinois Attorney General is requesting that this Court override the Illinois Constitution, the Illinois legislature, the rule adopted by the Illinois Supreme Court and an Illinois appellate court decision and impose a contrary rule in the name of federalism and comity. As the Seventh Circuit succinctly put it, such a result "would turn federalism on its head." *Boerckel v. O'Sullivan,* 135 F.3d 1194, 1201 (7th Cir. 1998); JA 37.

Although this is not an exhaustion case, Boerckel observes that the Attorney General's exhaustion arguments are incorrect. Given the fact that Illinois' practice regarding petitions for leave to appeal is consistent with this Court's *certiorari* practice, a claim should not be forfeited if it is not included in a petition for leave to appeal, particularly if the claim does not comport with the factors set out in a rule regarding discretionary review.

The Attorney General's argument that this case falls under the exception discussed in footnote one of *Coleman v. Thompson,* 501 U.S. 722 (1991) is misplaced. The exception discussed in *Coleman* was intended to make clear that a prisoner who forfeits a claim cannot avoid procedural default by manipulative litigation. Boerckel handled his claims in compliance with the state's rule. Moreover, the plain language of 28 U.S.C. § 2254(c) describes forfeiture in terms of the "right" to present an issue. By definition, a litigant does not have the right to present an issue if review is discretionary. Rather,

the litigant has at most the right to explain why the court should allow the litigant to present the issue. Where, however, the claim does not comport with factors set out in the rule governing discretionary review, it is arguable whether the litigant even has the right to seek review. In fact, adoption of a system of guided discretionary review which channels routine claims of error to the intermediate appellate courts and reserves the resources of the state's highest court for questions of broad significance could fairly be viewed as a waiver of the state's right to have every claim of error presented to the state's highest court.

Because requiring state prisoners to disregard state procedural rules on pain of forfeiture of their rights to federal habeas review offends principles of comity and federalism, the position of the Illinois Attorney General should be rejected and the decision below should be affirmed.

ARGUMENT

AN INDIVIDUAL WHO IS IN CUSTODY PURSUANT TO A STATE CRIMINAL CONVICTION SHOULD NOT BE BARRED FROM PURSUING CLAIMS IN A FEDERAL HABEAS PETITION IF THOSE CLAIMS WERE NOT RAISED ON DIRECT APPEAL IN A PETITION FOR DISCRETIONARY REVIEW TO THE STATE'S HIGHEST COURT

A. Absent a State Rule Requiring That a Prisoner Present an Issue in a Petition for Discretionary Review on Penalty of Forfeiture, the Federal Courts Should Not Require State Prisoners To Seek Discretionary Review From State Supreme Courts Prior to Instituting Federal Habeas Proceedings

Initially, it should be observed that despite the emphasis the Attorney General's brief places on the exhaustion doctrine, this case turns not on a question of exhaustion, but on a question of procedural default. In fact, the Attorney General recognizes that Mr. Boerckel can no

longer present the claims in this case in a petition for leave to appeal to the Illinois Supreme Court. Pet. Brf. 16. The Attorney General leaps to the conclusion that, since it is no longer possible to present the issues in this case to the Illinois Supreme Court, they are procedurally defaulted. *Id.* However, as discussed below, that conclusion is erroneous because procedural default results from the failure to comply with a firmly established state rule.

In this case, Boerckel complied with Ill.S.Ct.R. 315(a), a procedural rule that reserves the resources of the Illinois Supreme Court for questions of broad significance and channels routine claims of error to the intermediate appellate courts. As the Seventh Circuit pointed out, it would be inequitable to penalize a prisoner for following the state's rule. *Boerckel v. O'Sullivan,* 135 F.3d 1194, 1201 (7th Cir. 1998); JA 37.

Thus, a state prisoner should not have to present an issue in a petition for discretionary review to avoid forfeiture of the issue in federal habeas proceedings.

B. Where a State Has Formally Adopted a Rule Stating the Factors That Will Guide Its Discretion in Deciding Whether To Grant Discretionary Review, the Federal Courts Should Not Require State Prisoners To Ignore the State's Rule To Avoid Forfeiture of Claims in Federal Habeas Corpus Proceedings

As the Seventh Circuit discussed in *Boerckel,* Ill.S.Ct.R. 315(a) states that the criteria used by the Illinois Supreme Court in determining whether to grant a petition for leave to appeal include:

> the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed.

Boerckel, 135 F.3d at 1200; JA 34.

While Rule 315(a) states that whether a petition for leave to appeal will be granted "is a matter of sound judicial discretion," the criteria set forth in the rule effectively puts petitioners on notice that the Illinois Supreme Court will exercise its discretion to resolve questions of law for the lesser state courts, but will not exercise its discretion to review the application of the law to individual cases.

The three claims at issue in Boerckel's appeal to the Seventh Circuit were: 1) whether he knowingly and intelligently waived his *Miranda* rights; 2) whether his confession was involuntary; and 3) whether the evidence against him was insufficient to support a guilty verdict. *Boerckel,* 135 F.3d at 1196; JA 26-27. The omission of these claims in Boerckel's petition for leave to appeal to the Illinois Supreme Court was consistent with Ill.S.Ct.R. 315(a). These are fact-specific questions, rather than questions of "general importance." They do not involve "a conflict between the decision sought to be reviewed and a decision of the [Illinois] Supreme Court, or of another division of the Appellate Court." Likewise they do not raise "the need for the exercise of the [Illinois] Supreme Court's supervisory authority." Thus, Boerckel complied with Ill.S.Ct.R. 315(a) in omitting these issues from his petition for leave to appeal to the Illinois Supreme Court. Because he has not violated any state rule, Boerckel has not procedurally defaulted.

Illinois recognizes that the practice of the Illinois Supreme Court regarding petitions for leave to appeal is similar to this Court's *certiorari* procedure. *Boerckel,* 135 F.3d at 1200 (citing Ill.S.Ct.R. 315 Comm. Cmts); JA 35. See also, *People v. Edgeworth,* 30 Ill. App. 3d 289, 293, 332 N.E.2d 716, 719, (1st Dist. 1975). "To

remain consistent with *certiorari* practice, Boerckel's decision not to include all of his claims does not bar him from federal habeas relief." *Boerckel* at 1200; JA 35. As the Seventh Circuit noted in its opiinon:

> Boerckel provided Illinois state courts with an opportunity to review the matter in his direct appeal. . . . Our refusal to bar Boerckel from habeas review is a recognition of the inequity of penalizing a petitioner for following the requirements a state imposes on its second tier of appellate review. Allowing petitioners to exercise the discretion provided them by the states in selecting claims to petition for leave to appeal does not offend comity.

Boerckel, 135 F.3d at 1201; JA 37.

It should also be noted that a rule requiring state prisoners to petition for discretionary review of all claims on penalty of the forfeiture of those claims in federal habeas corpus proceedings will result in state supreme courts being inundated with petitions to review all possible claims regardless of how the state has tried to define the scope of its discretionary review.[1] This Court should decline to establish such a rule "for it would place burdens on the States and state courts in exchange for very little benefit to the federal courts."[2] *Coleman v. Thompson,* 501 U.S. 722, 738 (1991). As the Eleventh Circuit has observed, the requirements of 28 U.S.C. § 2254 "are rooted in the doctrine of comity and should not be so construed as to burden the state system with meaningless petitions for relief to forums which are not intended by state law to consider them." *Buck v. Green,* 743 F.2d 1567, 1569 (11th Cir. 1984).

[1] While in Boerckel's case, Ill.S.Ct.R. 315(a) merely narrowed the claims included in the petition for leave to appeal, in cases where there are only routine claims of error, adherence to the rule will spare the Illinois Supreme Court from having to review unnecessary petitions.

[2] In both 1996 and 1997, the total number of petitions for leave to appeal and appeals as of right in criminal cases filed with the Illinois Supreme Court exceeded one thousand. Approximately 3% of these were allowed (32 of 1,063 in 1996 and 31 of 1,068 in 1997). Annual Report of the Illinois Courts Statistical Summary—1997 p. 151, Table 2. In Illinois, convictions resulting in the imposition of the death penalty are appealed directly to the Illinois Supreme Court. Annual Report of the Illinois Courts Statistical Summary—1997 p. 150, Table 1, footnote (a).

C. Since No Firmly Established State Procedure Was Violated, There Was No Procedural Default

Illinois caselaw at the time of Boerckel's petition for leave to appeal to the Illinois Supreme Court and at present does not require that an issue be presented in a petition for leave to appeal to the Illinois Supreme Court to preserve the issue for federal review. As discussed in the Seventh Circuit's opinion, *People v. Edgeworth,* 30 Ill. App. 3d 289, 294, 332 N.E.2d 716, 720 (1st Dist. 1975), stated that a petition for leave to appeal "is not necessarily an adversary proceeding to which the application of . . . the doctrine of waiver . . . is appropriate." *Boerckel,* 135 F.3d at 1198; JA 31.

Procedural default is based on a petitioner's failure to comply with a state court procedural rule. *James v. Kentucky,* 466 U.S. 341, 348-51 (1984) established that only a "firmly established and regularly followed state practice" may be interposed by a state to prevent subsequent review by the Supreme Court of a federal constitutional claim. Where a state has adopted a rule that discourages convicted defendants from petitioning the state's highest court for review of certain types of claims, it cannot be said that the state had a "firmly established and regularly followed state practice" that such claims had to be presented to the state's highest court. See *County Court of Ulster County, N.Y. v. Allen,* 442 U.S. 140, 147-54 (1979) ("New York has no clear contemporaneous-objection policy that applies in this case. No New York court, either in this litigation or in any

other case that we have found, has ever expressly refused on contemporaneous-objection grounds to consider a post-trial claim such as the one respondents made.") (footnote omitted).

Boerckel has not failed to comply with any clearly established state practice. He presented all his issues to the Illinois appellate court in his appeal as of right and complied with Illinois Supreme Court Rule 315(a) in his selection of issues for his petition for leave to appeal to the Illinois Supreme Court.

D. Federalism Would Be Offended by the Adoption of the Illinois Attorney General's Position That State Prisoners Must Disregard Rules Promulgated by the State Supreme Courts

In this case, the Illinois Attorney General seeks to have the federal courts intervene in the establishment of state appellate court rules and effectively overturn the system of state supreme court review set up by the Illinois legislature and the Illinois Supreme Court pursuant to the Illinois Constitution.

Article VI, Section 1 of the Illinois Constitution provides that: "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." Article VI, Section 16 states, in pertinent part, that "The Supreme Court shall provide by rule for expeditious and inexpensive appeals."

The Illinois legislature has explicitly provided that the Illinois Supreme Court has the power to "make rules of pleading, practice and procedure." 735 ILCS 5/1-104.

The Illinois Supreme Court exercised its power to set practice and procedure by adopting Ill.S.Ct.R. 315(a). That rule states that the criteria used by the Illinois Supreme Court in determining whether to grant a petition for leave to appeal include "the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed." *Boerckel,* 135 F.3d at 1200; JA 26-27. Although Ill. S.Ct.R. 315(a) states that whether a petition for leave to appeal will be granted "is a matter of sound judicial discretion," the statement of the factors that may be considered in determining whether to grant review effectively puts petitioners on notice that the Illinois Supreme Court will exercise its discretion to resolve questions of law for the lesser state courts, but will not exercise its discretion to review the application of the law to individual cases.

As previously discussed, the only Illinois appellate court to address the issue concluded that a petition for leave to appeal to the Illinois Supreme Court is not the kind of proceeding to which application of the doctrine of waiver is appropriate. *People v. Edgeworth,* 30 Ill. App. 3d 289, 294, 332 N.E.2d 716, 720 (1st Dist. 1975). Thus, the Illinois Attorney General is also effectively asking that this Court overrule an Illinois appellate court's decision on whether Illinois law requires the presentation of issues in a petition for leave to appeal to the Illinois Supreme Court on pain of forfeiture.

The conflict between the position urged by the Illinois Attorney General's Office and principles of federalism did not escape the Seventh Circuit's notice. The Seventh Circuit stated:

> We also note that requiring petitioners to argue all of their claims to the state supreme court would turn federalism on its head. If a state has chosen a system that asks petitioners to be selective in deciding which claims to raise in a petition for leave to appeal to the state's highest court, we seriously question why this Court should require the petitioner to raise all claims to the state's highest court if he hopes to request

habeas review. The exhaustion requirement of § 2254 does not require such a result.

Boerckel, 135 F.3d at 1201; JA 37.

Neither federalism nor comity is offended by the result reached by the Seventh Circuit. However, the result urged by the Attorney General would do great violence to the principle of comity. Incredibly, the Attorney General argues that "it is irrelevant whether Illinois considers it necessary that petitioners raise every possible claim of error in order to exhaust their remedies."[3] Pet. Brf. 24. This Court's prior decisions show that the Attorney General is simply wrong. See *James v. Kentucky*, 466 U.S. 341, 348-51 (1984); *County Court of Ulster County, N.Y. v. Allen*, 422 U.S. 140, 147 (1979); *Murray v. Carrier*, 477 U.S. 478, 490-91 (1986); *Coleman v. Thompson*, 501 U.S. 722, 748-49 (1991).

Ignoring Ill.S.Ct.R. 315(a), the Attorney General argues that a rule requiring a prisoner to raise claims in a petition for discretionary review before presenting them in a federal habeas petition is "desirable" because it will encourage prisoners to present all their claims to the state's highest court and "may obviate the need for some cases or issues to even come to federal court." Pet. Brf. 17-18. The Attorney General also argues that it would not be unduly burdensome to require prisoners to present

[3] The Attorney General does not contend that state law requires that a claim be presented in a petition for leave to appeal to avoid forfeiture of the claim under state law. The Attorney General's argument that state law is irrelevant represents an implicit acknowledgment that the position of the Illinois Attorney General is in conflict with state law. Clearly, the Illinois Supreme Court has an interest in having its rules respected. That interest is not served by the position urged by the Illinois Attorney General. In this case, the interests of Boerckel and the state are in alignment since he followed the state's rule.

all of their claims in a petition for discretionary review to the state supreme court. Pet. Brf. 21.

The Attorney General's arguments regarding how desirable or burdensome it would be to have a different rule than the one adopted by the Illinois Supreme Court misconceive the way in which federal habeas corpus law depends upon and fortifies state law. The State of Illinois has decided not to employ its highest court as a general court of error. Illinois has chosen, instead, to rely on its intermediate appellate courts to correct most trial errors and to reserve the state supreme court for questions that have broad significance. Accordingly, in deference to state prerogatives, this Court should not fashion a federal scheme that will require prisoners to disregard the rule adopted by the Illinois Supreme Court. The Attorney General's position is flatly inconsistent with the comity owed to the State of Illinois, the Illinois Constitution, Illinois law and the rule adopted by the Illinois Supreme Court.[4]

[4] The Attorney General also argues that the rule it proposes would not create a trap for unwary inmates, a concern expressed by the Seventh Circuit in *Hogan v. McBride*, 74 F.3d 144, *modified on rehearing*, 79 F.3d 578 (7th Cir. 1996) and in this case, *Boerckel*, 135 F.3d at 1202, JA 38. Pet. Brf. 31. The Attorney General essentially argues that although there is no right to counsel on discretionary review, prisoners can copy the claims raised by counsel in the direct appeal so that "there is little risk that an unrepresented petitioner will be unable to present the perfected claims to the state's highest court". Pet. Brf. 31. The Attorney General apparently assumes that prisoners like Mr. Boerckel, who has an IQ of approximately 7[illegible] and a longstanding reading defect (*see People v. Boerckel*, 68 Ill. App. 3d 103, 111, 385 N.E.2d 815, 821 (5th Dist. 1979)), will have the assistance of good jailhouse lawyers in preparing their petitions for discretionary review. The history of this case undermines that assumption. Boerckel's *pro se* petition for a writ of habeas corpus ignored the issues that had been preserved for federal habeas review and presented numerous issues that are not cognizable in habeas corpus. (Record 1) After a preliminary review of the case, the district court appointed counsel with directions that counsel prepare and file an amended petition. (Record 38)

Requiring defendants to include all possible claims in petitions for leave to appeal to the state supreme courts without regard to either the state's criteria for determining what issues to review or state caselaw on the effect of failing to include a claim in a petition for leave to appeal would offend the principle of comity. As the Eleventh Circuit has stated, the requirements of 28 U.S.C. § 2254 "are rooted in the doctrine of comity and should not be so construed as to burden the state system with meaningless petitions for relief to forums which are not intended by state law to consider them." *Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984) (*quoting Williams v. Wainwright*, 452 F.2d 775, 777 (5th Cir. 1971)). See also *Smith v. White*, 719 F.2d 390 (11th Cir. 1983) (*following Williams v. Wainwright*, 452 F.2d 775, 777 (5th Cir. 1971)); *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994) ("concerns of comity are best met by not requiring fruitless and burdensome petitions").

In addition to adopting rules, such as Ill.S.Ct.R. 315(a), several state supreme courts have made it clear in their published opinions that they have chosen not to be general courts of error. The Supreme Court of South Carolina has stated:

> We recognize that criminal and post-conviction relief litigants have routinely petitioned this Court for writ of *certiorari* upon the Court of Appeals' denial of relief in order to exhaust all available state remedies. We therefore declare that in all appeals from criminal convictions or post-conviction relief matters, a litigant shall not be required to petition for rehearing and *certiorari* following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies.

In Re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 321 S.C. 563, 564, 471 S.E.2d 454 (S.C. 1990) (footnote omitted). See also *State v. Sandon*, 161 Ariz. 157, 777 P.2d 220 (Ariz. 1989) (holding that claims that do not justify state supreme court review under Ariz.R.Crim.P. 32.1 are exhausted when decided by the Court of Appeals); *Freeman v. Commonwealth*, 697 S.W.2d 133 (Ky. 1985) (finding that where the only basis for petitioning for discretionary review was to preserve issue for federal review, petition was frivolous and justified sanctions).

Adoption of the position urged by the Attorney General would have the undesirable effect of encouraging prisoners in Illinois to disregard the factors set forth in Ill.S.Ct.R. 315(a) in selecting issues to present in a petition for leave to appeal. This result comes about because, under the approach urged by the Attorney General, a prisoner who respected Ill.S.Ct.R. 315(a) and presented only those issues that comported with the factors set out in Rule 315(a) would lose the right to present any other issues in federal habeas proceedings. By cutting off habeas review in a case such as this where the prisoner has abided by the state's procedural rules, this Court would be inviting prisoners to ignore state procedural rules in order to preserve the possibility of habeas review. Such a decision would be inconsistent with this Court's prior procedural default cases which sent a clear message that state prisoners should litigate responsibly and comply with state procedural rules. See, e.g., *James v. Kentucky*, 466 U.S. 341 (1984); *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140 (1979); *Murray v. Carrier*, 477 U.S. 478 (1986); *Coleman v. Thompson*, 501 U.S. 722 (1991).

The Illinois Supreme Court has orchestrated a sensible system of judicial review, sensitive to the serious claims that litigants raise, but cognizant of the sheer volume

of cases and claims.[5] The system adopted by the Illinois Supreme Court channels relatively routine fact-sensitive questions to the intermediate appellate courts, reserving the supreme court for issues of broader significance. It should be respected.

E. Prisoners Should Not Be Required to Petition for Discretionary Supreme Court Review of General Claims of Error, Especially When a State Rule Discourages Such a Practice, in Order to Exhaust Their Claims

As noted at the outset of this brief, this case is about procedural default, not exhaustion. The Attorney General's brief acknowledges that Boerckel cannot present his remaining claims to the Illinois Supreme Court. Nonetheless, it should be pointed out that the Attorney General's argument that a prisoner must present a claim in a request for discretionary review in order to exhaust the claim is incorrect.

In *Fay v. Noia*, this Court determined that the failure of a prisoner to seek *certiorari* from this Court does not bar the prisoner from seeking federal habeas relief. *Fay v. Noia*, 372 U.S. 391, 435 (1963), *overruled on other grounds, Wainwright v. Sykes*, 433 U.S. 72 (1977), and *abrogated by Coleman v. Thompson*, 501 U.S. 722 (1991). When a state sets up a level of discretionary review similar to that employed by this Court, the effect of not seeking discretionary review from the state court should be no different than the effect of not seeking discretionary review in this Court.[6]

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[5] In 1997, more than half of the filings in the Illinois Supreme Court, 1,848 out of 3,591, were petitions for leave to appeal. Annual Report of the Illinois Courts Statistical Summary—1997 p. 15, figure 1.

[6] The Attorney General implies that the Seventh Circuit's reliance on the similarity of Illinois' system of discretionary review and this Court's *certiorari* procedure is flawed because only review in the Illinois Supreme Court can be viewed as a state remedy for exhaustion purposes. Pet. Brf. 24-25. The Attorney General's argument misapprehends the analogy drawn by the circuit court. The point is that both the Illinois Supreme Court and this Court explicitly discourage litigants from seeking review of all manner of claims and thus screen the great mass of cases for those that have wider significance and thus warrant treatment by the final referee. That analogy is perfectly sound.

The Attorney General argues that this case is an exception to the rule that federal habeas review is available when a state court has not made it clear that its decision rests on an independent and adequate state ground discussed in a footnote of this Court's opinion in *Coleman v. Thompson*, 501 U.S. 722 (1991). Pet. Brf. 15. This case, however, has nothing to do with the exception discussed in footnote 1 of the *Coleman* opinion. The exception noted in *Coleman* is intended to ensure that prisoners are not allowed to manufacture ambiguity by manipulative litigation in the state courts. See *Coleman*, 501 U.S. at 735, n.1 and accompanying text. Nothing of that kind occurred in this case. There is no ambiguity here about whether the intermediate appellate court denied the claims in this case on the basis of default or on the merits. The intermediate appellate court denied Boerckel's claims on the merits. In addition, footnote 1 of *Coleman* refers to a situation where the prisoner can no longer present his claims to a court to which he "would be required to present his claims in order to meet the exhaustion requirement." But the fact that Illinois discourages litigants from presenting all of their claims to the Illinois Supreme Court is evidence that presentation of claims to the Illinois Supreme Court is not required for exhaustion.[7] *Boerckel*, 135 F.3d at 1200; JA 34.

A prisoner who has fairly presented his claims to the state courts in the manner prescribed by the state should

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[7] The Attorney General's brief recognizes that if Boerckel filed a state post-conviction petition raising the claims now at issue, the petition would be denied not on the basis of procedural default, but on the basis of redundancy. Pet. Brf. 18.

be deemed to have exhausted his remedies. Boerckel abided by the state's rules. As this Court has previously stated:

> It has been settled since *Ex Parte Royall,* 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus. The exhaustion-of-state-remedies doctrine, now codified in the federal habeas statute, 28 U.S.C. ss 2254(b) and (c), reflects a policy of federal-state comity. . . . It follows, of course, that once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied.

Picard v. Connor, 404 U.S. 270, 275 (1971) (citations omitted). See also *Stewart v. Martinez-Villareal,* 118 S.Ct. 1618, 1621-22 (1998).

28 U.S.C. § 2254(c) provides that: "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." Under the plain language of 28 U.S.C. § 2254(c), claims are exhausted if the petitioner does not have the "right," under state law, to raise the issue.

By definition, a system of discretionary review does not grant a petitioner the "right" to present a claim. Rather, petitioner has, at most, the "right" to attempt to persuade the state supreme court that petitioner's claim justifies that court's review. When a petitioner's claim does not comport with any of the factors a state supreme court has formally stated it considers in deciding whether to grant review, petitioners may not even have a good faith basis for arguing that the claim merits supreme court review. Because there is no right to file a frivolous petition, there will be some cases where there is no "right" to seek discretionary review.

This Court has rejected a narrow reading of 28 U.S.C. § 2254(c) that would "preclude a finding of exhaustion if there exists any possibility of further state-court review." *Castille v. Peoples,* 489 U.S. 346, 350 (1989) (*citing Brown v. Allen,* 344 U.S. 443, 448-49, n.3 (1953)). Instead, this Court has observed that it is "well settled that 'once [a] federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied.'" *Castille,* 489 U.S. at 351 (*citing Picard v. Connor,* 404 U.S. 270, 275 (1971)).

In *Castille v. Peoples,* this Court concluded that the presentation of an issue in a petition for allocatur to the state's supreme court was not fair presentation for exhaustion purposes because the merits would only be considered if there were "special and important reasons therefor." *Castille,* 489 U.S. at 351 (*quoting* Pa. Rule App. Proc. 1114).

As this Court stated in *Wilwording v. Swenson,* 404 U.S. 249 (1971) (per curiam), "[t]he exhaustion requirement is merely an accommodation of our federal system designed to give the State an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording v. Swenson,* 404 U.S. at 250 (*quoting Fay v. Noia,* 372 U.S. 391, 438 (1963), *overruled on other grounds, Wainwright v. Sykes,* 433 U.S. 72 (1977), and *abrogated by Coleman v. Thompson,* 501 U.S. 722 (1991)). *Wilwording v. Swenson* rejected the idea that state inmates had to invoke "any number of possible alternatives to state habeas" before filing a federal habeas petition, observing that whether the State would have heard the claims under any of the proposed alternative proceedings "is a matter of conjecture." *Wilwording v. Swenson,* 404 U.S. 249, 249-50 (1971).

Petitions for discretionary review to a state supreme court are analogous to Pennsylvania's petition for allocatur discussed in *Castille v. Peoples* and, as in *Wilwording v. Swenson,* whether such a petition would result

in review of the claims "is a matter of conjecture." Consistent with *Castille v. Peoples* and *Wilwording v. Swenson*, this Court should hold that the presentation of an issue in a petition for discretionary review by a state supreme court is not necessary to fairly present the issue to the state courts.

As the Eighth Circuit concluded in *Dolny v. Erickson*, 32 F.3d 381, 384 (8th Cir. 1994), the right to raise an issue referred to in 28 U.S.C. § 2254(c) "means more than a mere opportunity to seek leave to present an issue; it means a realistic, practical chance to present an issue and have it considered on the merits."

The fact that Illinois discourages litigants from raising all possible claims is evidence that Illinois does not consider it necessary to raise all possible claims to comply with exhaustion requirements. *Boerckel*, 135 F.3d at 1200; JA 34. In fact, a state's adoption of a system of guided discretionary review which channels routine claims of error to the intermediate appellate courts and reserves the resources of the state's highest court for questions of broad significance could fairly be viewed as a waiver of the state's right to have every claim of error presented to the state's highest court.[8] Moreover, as the Seventh Circuit noted, contrary to the Attorney General's contention, its holding would not obliterate any opportunity for a state's supreme court to protect federally secured rights since presenting a claim to the state's supreme court cannot hurt and could potentially help the defendant. *Boerckel*, 135 F.3d at 1201; JA 37.

The Attorney General's argument that requiring the presentation to the Illinois Supreme Court of all possible claims, a practice Illinois Supreme Court Rule 315(a) is

[8] Clearly, some state supreme courts consider it beneficial to waive the right to be presented with every claim of error. *See In Re Exhaustion of State Remedies in Criminal and Post-Conviction Cases*, 321 S.C. 563, 471 S.E.2d 454 (S.C. 1990); *State v. Sandon*, 161 Ariz. 157, 777 P.2d 220 (Ariz. 1989).

obviously intended to discourage, will aid judicial efficiency is without merit. Judicial efficiency would in fact be hampered by the position urged by the Attorney General because it would require prisoners in Illinois to burden the Illinois Supreme Court with fact-intensive claims that the Illinois Supreme Court has already determined do not merit supreme court review. Presentation of the types of claims the Illinois Supreme Court is not intended to hear in a petition for leave to appeal is simply a waste of the resources of the supreme court and the parties.[9]

Where, as in this case, a state has adopted a system intended to channel general claims of error to the intermediate state appellate courts while reserving the state supreme court's resources for questions of broader significance, requiring prisoners to petition the state supreme court to review general claims of error simply burdens the state supreme courts for little or no benefit to the federal courts. Consequently, the Seventh Circuit was correct in concluding that "an applicant has exhausted the remedies available if he takes advantage of whatever appeals the state system affords as of right." *Boerckel*, 135 F.3d at 1200; JA 34.

[9] It should also be observed that the Illinois Attorney General's attempt to override the system of supreme court review set up by the Illinois Supreme Court is inconsistent with the separation of powers doctrine explicitly set out in the Illinois Constitution. Article II, Section 1 of the Illinois Constitution provides: "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another."

CONCLUSION

Where a state has established a system of discretionary review whereby general claims of error are channeled to the intermediate appellate courts and the resources of the state supreme court are reserved for questions of broad significance, prisoners should not be penalized for respecting the state's rules in formulating their petitions for discretionary review.

Because it would violate principles of comity and federalism to require a state prisoner to disregard a state procedural rule promulgated by the Illinois Supreme Court, pursuant to the Illinois Constitution and Illinois statute, the judgment of the Seventh Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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